

### **REMARKS**

The Office Action dated May 6, 2003 has been fully considered by the Applicant. By way of the present amendment, independent Claims 12 and 17 have been amended to clearly convey the present invention.

The rejection of Claims 12 through 21 under 35 U.S.C. §103(a), as now amended, as unpatentable over Rieger in combination with Traelnes and further in view of Papikian is respectfully traversed.

As now amended, independent Claim 12 clearly convey that the tank is positioned in a vertical orientation as opposed to the horizontal arrangement disclosed in Rieger. As now set forth in Claims 12 and 17, the tank is positioned so that the bottom is horizontal. This causes the cap to float parallel to and opposed to the generally horizontal bottom. This is to be contrasted with Rieger which provides a horizontal tank wherein the cap would not float opposed to the bottom and wherein the impellers would tend to chop up the cap which is discouraged during the cap management fermentation process. Stated in other words, the cap floats above the impeller or impellers so that the cap is moved radially and axially by fluid force from the movement of the wine in the tank.

Assuming that Rieger were used as in the present invention, the impeller blades would tend to chop up the cap. The impeller blades would hit, smash, and macerate the skins and stems that make up the floating cap which promotes astringency and bitterness.

Rieger states that “the pomace cap accumulating on the surface of the juice is broken up into individual pieces by the blades and punched down into the juice”. Rieger also states its goal to efficiently break up the pomace cake into pieces and efficiently propel such pieces through the grape juice component of said wine grape must. This is to be contrasted with the present invention where

the impeller blades are not used to directly chop up the cap but are used to move the fluid which gently erodes the cap tending to turn the cap into the fluid.

With respect to Claim 12, the Examiner correctly notes that Rieger does not provide for a baffle or baffles to assist in axial flow of the fluid. The Examiner attempts to combine Traelnes with Rieger to derive the teachings of the present invention. It is respectfully submitted that the reliance on Traelnes is misplaced. Traelnes illustrates a plurality of serrated discs having serrated teeth which are used to zones of shear adjacent the serration. This is opposite to the effect which is desired in the present invention which is to encourage complete axial and radial flow to generate velocity to erode away at the floating cap.

Claim 17 is also to be contrasted to Rieger wherein the majority of the wine is drained from the tank before the impeller blade near the bottom.

The remaining claims are dependent on independent Claims 12 and 17 and are believed allowable for all of the same reasons.

Moreover, there is no disclosure or suggestion to combine the teachings of Rieger, Traelnes and Papikian.

It is improper to combine references to achieve the invention under consideration unless there is some incentive or suggestion in the references to do so.

The Court of Appeals for the Federal Circuit has repeatedly held that under Section 103, teachings from various references can be combined only if there is some suggestion or incentive to do so. ACS Hospital Systems, Inc. v. Montefiore Hospital, 732 F2d 1572, 221 USPQ 929 (CAFC 1984).

Stated another way:

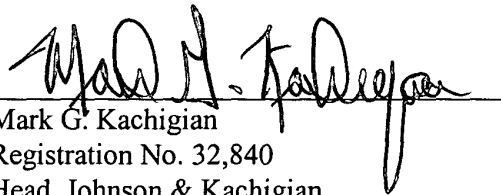
It is impermissible, however, simply to engage in a hindsight reconstruction of the claimed invention, using the applicant's structure as a template and selecting elements from references to fill the gaps...The references themselves must provide some teaching whereby the applicant's combination would have been obvious. In re Gorman, 18 USPQ2d 1885 (CAFC 1991).

The Examiner is required to follow the law as set forth by the Federal Circuit. In summary, the combination of patents to achieve the claims of the present invention is untenable.

Finally, new Claim 22 has been added which clarifies that the sloped bottom is substantially planar in contrast to the arched bottom of Rieger asserted by the Examiner.

It is believed that the foregoing is fully responsive to the outstanding Office Action. It is believed that the application is now in condition for allowance and such action is earnestly solicited. If any further issues remain, a telephone conference with Examiner Bhat is respectfully requested.

Respectfully submitted,



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